S139073

IN THE SUPREME COURT OF CALIFORNIA

JEFFREY ELKINS
Petitioner

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF CONTRA COSTA
Respondent

MARILYN ELKINS
Real Party in Interest

PETITIONER'S REPLY TO RESPONDENT'S RETURN

I.
INTRODUCTION

There are a number of themes that run throughout Respondent Court's Return that Petitioner would like to highlight. First, the Return is virtually devoid of case law supporting the Court's radical view of what constitutes a "trial" save a bankruptcy case and an unpublished opinion from the State of Washington. Instead, Respondent Court

relies primarily on generalities such as “deep roots in equity procedures” and “frequently used in federal court” to justify its procedures. As will be seen, these are gross exaggerations. In fact, the Return does not discuss nor even cite the controlling United States Supreme Court authority on when Due Process permits the elimination of the right to present oral testimony at trial. When the Respondent Court’s challenged procedures are measured against that yardstick, the reason for the omission becomes obvious.

The Court’s Return repeatedly characterizes its procedures as “discretionary.”[1] While this might be technically accurate, it is not true. The procedures are *mandatory* and they are used in virtually all cases, including those involving *pro pers*, litigants of modest means and child custody. They are “discretionary” only in the sense that the judge technically has the power to deviate from them in “unusual” cases. Note that Respondent Court did not provide a single example of what would constitute an “unusual” circumstance. Petitioner’s situation certainly did not qualify as “unusual” enough to permit him to introduce any exhibits that did not meet the Court’s technical, nonstautory requirements for admission.

Respondent Court also essentially concedes that the Trial Setting Order (TSO) under which this and *thousands* of other cases have been decided is statutorily improper but argues that by the time this Court acts, that issue will be “moot -- except perhaps to the litigants who have been adversely affected by it. Respondent Court also makes clear that it intends on continuing to impose the TSO irrespective of this proceeding, until the

[1] See, e.g. Court’s Return, pp. 2, 8, 9 (twice), 14.

Court can turn it into an official local rule. The fact that doing so violates state statutory law[2] is not seen as an impediment.

Finally, the Court's Return shows that this case is a battle for the future of family law, and perhaps civil law, in this State. There is no regret in the Court's position to move away from trials as we know them. It views the traditional right to look the judicial officer in the eye, advance one's position, and have the judicial officer weigh credibility as a quaint anachronism that should be replaced by a more streamlined approach whereby all direct and impeachment testimony is presented in writing and the litigants simply trust that their affidavits have been given proper attention by the judge.[3] Based upon one published and one as-yet unpublished law review articles, it believes that centuries of judicial experience whereby judges weigh credibility by evaluating the witness offering the testimony should be replaced by affidavits written for the witness by another. Furthermore, there is nothing in the Return that would lead one to believe that the Court intends on limiting this procedure to family law. If it can be applied to family law, an area where witness credibility is in most need of evaluation and where judges need perhaps the most sensitivity, there is no reason why it cannot be applied in *all* civil and dependency cases as well. If trial by affidavit is as superior as Respondent Court believes it to be, it is logical to assume that soon malpractice, personal injury, breach of contract and all other specie of civil cases will likewise be subject to this rule.

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[2] Code of Civil Procedure §575.1 (c).

[3] This is a legitimate concern. In this case, the trial judge had not even read Petitioner's declaration before trial began. Instead, he read it on the bench while the proceedings were underway. (Reporter's Transcript 9/19/05 (RT), pp. 2, 5/20-6/2.)

II.

THE RETURN RELIES HEAVILY ON UNSUPPORTED GENERALIZATIONS THAT FIND NO SUPPORT IN THE RECORD

The Return relies heavily on unsupported allegations such as:

> "Local Rule 12.5(b)(3) is also sound policy. In addition to reducing delay, the use of written direct evidence minimizes conflict by limiting the occasions for adversarial confrontation between estranged spouses, assists self-represented litigants by helping to guide them through preparation for trial, avoids surprise, and encourages settlement."[4]

All of these are laudable goals, but there is no basis for the conclusion that any of them are fostered by these Rules.

Limiting adversarial confrontation: Respondent Court fails to explain how requiring direct evidence to be presented by declaration and excluding exhibits that do not comply with its complex, nonstatutory requirements properly "limit[s] adversarial confrontation," except in cases such as this one where it effectively denied it altogether. Moreover, as unpleasant as "adversarial confrontation" is, especially in a family law context, the right of confrontation is constitutionally guaranteed.[5] The desire to limit this unpleasant aspect of family law judging may help explain the Court's desire to impose these rules.

Assists self-represented litigants: Respondent Court argues repeatedly that their Rules "promote fairness and assist self-represented family law litigants in family law

[4] Court's Return, p. 2.
[5] *Goldberg v. Kelly* (1970) 397 U.S. 254, 269-270, 90 S.Ct. 1011, 25 L.Ed.2d 287.

actions by giving them direction as to how to prepare for trial, how to frame issues properly, and how to present evidentiary support for their positions, and thereby avoid being 'blindsided' by the adverse party."[6]

Respondent Court never explains how these Rules accomplish any of these laudable purposes. Instead, we see in this case how these Rules "assist" *pro pers*. As has been argued by Real Party in Interest, Petitioner is not your average *pro per*. He is a business executive fluent in English and well-educated. He is not, however, a lawyer. He attempted in good faith to comply with the Rules. He filed his declaration and prepared his exhibit binder. He lodged the binder with the Court and served opposing counsel on Friday before a Monday trial. His exhibits were excluded not because they were legally inadmissible, but because he failed to comply with the local rule that the "evidentiary foundation for admission of the proposed exhibits [be] completely set forth in the declaration(s)."[7] Even when the Court inquired as to the evidentiary foundation of one document and Petitioner made a *prima facie* showing of its admissibility,[8] it was still excluded.

Respondent Court's attempt to cast its Rules as *pro per* friendly also does not take into consideration the capabilities of those appearing before it in *pro per* to comply with the Rules. A large percentage of Contra Costa County's population is Hispanic and poor.[9] These Rules are extremely complex. How are those with limited education and language

[6] Court's Return, pp. 5, 29.
[7] Trial Scheduling Order, ¶ 2, filed April 22, 2005, AA, Tab 2.
[8] RT, pp. 8-9.

skills supposed to comply with them? As both Real Party in Interest and Respondent have pointed out, Jeffrey had neither of these impediments and was still essentially defaulted for failure to literally comply with the Rules. This shortcoming in and of itself can rise to constitutional proportions. In *Goldberg v. Kelly*,[10] the Supreme Court held that procedural due process requires that pre-termination evidentiary hearings be held when public assistance payments to welfare recipients are discontinued. It further held that procedures followed by the City of New York in terminating public assistance payments to welfare recipients were constitutionally inadequate by failing to permit recipients to appear personally with or without counsel before the official who finally determined continued eligibility and by failing to permit recipients to present evidence to that official orally or to confront or cross-examine adverse witnesses. The *Goldberg* Court further held:

> "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decision maker in writing or second-hand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance."[11]

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[9] U.S. Census Bureau, State and County QuickFacts, Contra Costa County (2004), www.quickfacts.census.gov/qfd/states/06/0606013.html.
[10] *Goldberg v. Kelly, supra,* 397 U.S. at pp. 268-269.
[11] Ibid.

The same is true of the Rules challenged herein. These are not designed to be *pro per* friendly rules. We also see from this case how judicial officers exercise their discretion when implementing them.

Avoids surprise: Petitioner understands and agrees that "avoid[ing] surprise" is generally a laudable goal in family law proceedings; that is why we have liberal discovery rules and mandatory disclosures. But it is not always a benefit. Any judicial officer who has sat in a family law department is used to litigants swearing to diametrically opposite versions of the exact same event. Impeachment evidence is often vital in assisting the judicial officer to determine which version cleaves closest to the truth. One of the "improvements" in its Rules to which Respondent Court alludes is the requirement that all impeachment evidence and proposed 776 examination must now be disclosed in advance along with direct evidence.[12]

In no other area of law is credibility as important, or often as difficult to measure, as it is in family law. One way to test credibility is through the time-honored mechanism of cross-examination whereby the examiner asks a question to which s/he expects the witness to give an incorrect answer, so that the witness can then be confronted by impeachment evidence. The Rules hamstring this technique by requiring the questioner to disclose to the witness their impeachment evidence and 776 examination in advance.[13] Obviously, the answer one can expect will be very different than if one is able to

[12] Proposed Local Rule 12.8.F.5.

"surprise" witnesses with the same question or evidence in front of the judge rather than giving them time to prepare an explanation.

While the Court certainly has the right to limit cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant, the cross-examiner must have "the opportunity to place the witness in his or her proper light, and to put the weight of the witness's testimony and credibility to a reasonable test which allows the fact finder fairly to appraise it."[14]

Encourages settlement: The Court offered nothing to substantiate this assertion. Even if it were accurate, before extolling it as a virtue one must still know how and why cases are settling. If people are waiving their right to a trial because they cannot afford the average $10,000 cost that is required to comply with the Rules[15] or because they cannot otherwise comply with them, then "encourag[ing] settlement" is not a virtue.

Reduces Delay: Petitioner does not dispute that the implementation of these Rules may have reduced calendar delays in Respondent Court. Again, the relevant questions are "how and why." The reduction in the time required for a hearing could be due to cases

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[13] Proposed Local Rule sections 12.8.F.5 and 12.8.F.1.b. (See also more recent version of Trial Setting Order attached as Exhibit 1 to Petition for Review.)
[14] *In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1385-1386, 112 Cal.Rptr.2d 620.
[15] This figure was provided by Supervising Family Law Judge Barry Baskin at a luncheon speech to the Family Law Section of the Contra Costa County Bar Association on January 11, 2006, discussing these Rules.

such as Petitioner's that are scheduled for one day but are instead summarily disposed of through the draconian operation of the Court's Rules. Likewise, the Court does not tell us how many litigants that can afford it are buying Due Process by electing costly private adjudication. Obviously, if the Court makes getting a "trial," at least as it is commonly understood, difficult enough and provides an inadequate opportunity for people to get their evidence before the court, people will go elsewhere to resolve their disputes and thereby reduce the court's calendar. Whether this policy comports with Due Process is an issue herein. Whether it enhances the public's trust and confidence in the courts *is* known.[16]

Petitioner believes that a major reason that the Rules may be reducing delay is that they are designed to place such an unreasonable burden on litigants that they force a settlement or private adjudication. In complex cases, where all direct testimony must be laid out in declarations and no additional direct evidence is permitted, declarations are often excruciatingly long with the attachments delivered in banker's boxes. To expect trial judges to digest these long declarations and review the exhibits is unrealistic. The purpose is as much to place obstacles between the litigants and trial court in hopes of forcing settlement as it is to streamline the presentation of evidence. When a rule is "onerous [or] cumbersome" and places "'burdensome hoops'" upon any party seeking a meaningful opportunity to be heard before the court", it will be held to violate Due Process.[17]

[16] See discussion herein at Section X.
[17] *Lammers v. Super. Ct. (Lammers*) (2000) 83 Cal.App.4th 1309, 1327, 100 Cal.Rptr.2d 455.

III.
THE GOAL OF JUDICIAL EFFICIENCY, WHILE LAUDABLE, MUST STILL GIVE WAY TO THE RIGHT OF FAMILY LAW LITIGANTS TO HAVE THEIR "DAY IN COURT."

The Court's position that efficiency trumps the rights of the family law litigants to have adequate time to present their case to the judicial officer shows that the County has taken a giant step backwards from the progress that Family Law has seen over the last few decades. The plight of family law litigants has been well chronicled by our Appellate Courts. The most eloquent plea was from Justice Gardner in *Marriage of Brantner* when he penned these oft-quoted words:

> "[W]e quite agree that any procedure which reduces the amount of courtroom litigation is thoroughly commendable—in the abstract. However, this concept, too, has its limitations. While the speedy disposition of cases is desirable, speed is not always compatible with justice. Actually, in its use of courtroom time the present judicial process seems to have its priorities confused. Domestic relations litigation, one of the most important and sensitive tasks a judge faces, too often is given the low-man-on-the-totem-pole treatment, quite often being fobbed off on a commissioner. One of the paradoxes of our present legal system is that it is accepted practice to tie up a court for days while a gaggle of professional medical witnesses expound to a jury on just how devastating or just how trivial a personal injury may be, all to the personal enrichment of the trial lawyers involved, yet at the same time we begrudge the judicial resources necessary for careful and reasoned judgments in this most delicate field—the breakup of a marriage with its resulting trauma and troublesome fiscal aftermath. The courts

> should not begrudge the time necessary to carefully go over the wreckage of a marriage in order to effect substantial justice to all parties involved."[18]

This quote has appeared in numerous other cases lamenting the same judicial attitude towards family law cases, including the landmark opinion, *Marriage of Morrison*.[19]

In more recent times, this issue was addressed in a similar context in *Lammers v. Superior Court*, where the Court of Appeal, relying on *Mathews v. Eldridge*,[20] held the San Diego local pre-read rule unconstitutional as applied. The Court of Appeal sympathized with the need of family law courts to adopt streamlined procedures to facilitate the resolution of cases before them. However, it stressed that the procedures cannot violate the parties' rights to a fair trial:

> "Given the staggering number of cases that judges assigned to domestic relations law and motion calendars in busy metropolitan courts must hear and decide, superior courts have been compelled to adopt processes designed to expedite hearings on motions and OSC's and to conserve finite judicial resources, while endeavoring to preserve the right to a full and fair hearing for the parties. However, whether the court-imposed process is the use of declarations and affidavits instead of live testimony (*Reifler v. Superior Court* (1974) 39 Cal.App.3d 479, 485), the requirement to 'meet and confer', advance notification of settlement or continuance, mandatory confirmation of a scheduled proceeding 48 hours in advance, or imposing time limitations on oral argument, a measure implemented for the sake of efficiency cannot jeopardize the constitutional integrity of the judicial

[18] *In re Marriage of Brantner* (1977) 67 Cal.App.3d 416, 422, 136 Cal.Rptr. 635.
[19] *In re Marriage of Morrison* (1978) 20 Cal.3d 437, 143 Cal.Rptr. 139; see also Justice King writing in *In re Marriage of Hatch* (1985) 169 Cal.App.3d 1213, 215 Cal.Rptr. 789.
[20] *Mathews v. Eldridge* (1976) 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893.

> process. *In other words, court congestion and 'the press of business' will not justify depriving parties of fundamental rights and a full and fair opportunity to present all competent and material evidence relevant to the matter to be adjudicated*."[21]

In *Spector v. Superior Court of San Mateo County*, this Court reiterated the need for litigants to have their day in court:

> "It is a cardinal principle of our jurisprudence that a party should not be bound ... by a judgment unless he has had his day in court. This means that a party must be duly cited to appear and afforded an opportunity to be heard and to offer evidence at such hearing in support of his contentions."[22]

In a case involving custody of a minor child, the United States Supreme Court stated, "[t]he establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication."[23] However, the Court ultimately found that:

> "[T]he *Constitution recognizes higher values than speed and efficiency*. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were *designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy*.…[24]

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[21] *Lammers v. Super. Ct. (Lammers)*, *supra*, 83 Cal.App.4th at pp. 1318-1319 (emphasis added, some internal citations omitted).
[22] *Spector v. Superior Court of San Mateo County* (1961) 55 Cal.2d 839, 843, 13 Cal.Rptr. 189.
[23] *Stanley v. Illinois* (1972) 405 U.S. 645, 656, 92 S.Ct. 1208, 31 L.Ed.2d 551.
[24] Ibid. (Emphasis added.)

This frames the issue. Does the Respondent's Court's attempts to streamline its calendar by essentially requiring the parties to present all direct, and now impeachment, evidence by declaration and excluding otherwise admissible evidence[25] deprive the "parties of fundamental rights and a full and fair opportunity to present all competent and material evidence relevant to the matter to be adjudicated"? Petitioner believes that they do.

[25] Trial Scheduling Order, ¶ 2, filed April 22, 2005, AA, Tab 2.

IV.
THE COUNTY HAS FAILED TO DISCUSS OR EVEN MENTION THE CONTROLLING AUTHORITY ON WHEN DUE PROCESS REQUIRES AN EVIDENTIARY HEARING

Interestingly, Respondent Court's Return discusses equity procedures back to Blackstone's Commentaries but fails to discuss *Mathews v. Eldridge*,[26] the seminal United States Supreme Court case on when "the Due Process Clause of the Fifth Amendment requires … an evidentiary hearing."[27] It is the authority relied upon by many of the cases which Respondent Court cites in support of its Rules, yet the Court neither cites *Mathews* nor discusses the balancing test that it requires. The reason is that when the *Mathews* test is applied to the procedures promulgated by the Court herein, it is clear that they do not comport with Due Process.

A. *Mathews* Requires a Balancing Before Denying Litigants the Right to Present Oral Testimony in Their Cases: The proceeding at issue in *Mathews* was an administrative one, namely whether a person whose social security disability benefits had been terminated was entitled to an evidentiary hearing. The Supreme Court recognized that "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment"[28] and that some form of hearing is required before an individual is finally deprived of a property interest.

[26] *Mathews v. Eldridge, supra,* 424 U.S. 319.
[27] Id. at p. 323.
[28] Id. at p. 332.

> "The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' [Citation.] The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[29]

But "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." [Citation.] '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'"[30]

Accordingly, whether the procedures provided were constitutionally sufficient required a balancing of the affected governmental and private interests by consideration of three distinct factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[31]

Using this framework, the Court then weighed the various factors and determined that the utilized procedures accorded the recipient Due Process.

[29] Id. at p. 333.
[30] Id. at p. 334.
[31] Id. at p. 335.

The Recipient's Private Interest: The Court agreed that the recipient's interest in the continued disability benefits was substantial. However, a recipient who had been denied benefits by the challenged procedure had a right thereafter to a full evidentiary hearing before an SSA administrative law judge and, if successful, was awarded full retroactive relief. Thus, the recipient's sole interest was in the uninterrupted receipt of this source of income pending final administrative decision on his claim.

The Risk of Erroneous Deprivation: A factor to be considered was the fairness and reliability of the existing pre-termination procedures and the probable value, if any, of additional procedural safeguards. The risk of the denial of the right to present evidence at the termination proceeding was deemed to be minimal as the "issues of credibility and veracity do not play a significant role in the disability entitlement decision, which turns primarily on medical evidence."[32]

The Government's Interest: Finally, the Court weighed that interest against the Agency's interest in a streamlined procedure:

> "In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits."[33]

[32] Id. at p. 325.
[33] Id. at p. 347.

Thus, applying the three-part balancing test, the Court concluded that SSA's procedures did not violate the recipient's Due Process rights.

The Court did not suggest that full evidentiary hearings were required in all circumstances:

> "But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost."[34]

The Court went on, however, to make it clear that its discussion was focused on "when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness."[35] Nowhere in the opinion did it suggest that it would be appropriate to transmute these abbreviated administrative procedures into purely judicial proceedings.

Whether or not one acknowledges *Mathews*, it is still clear that the burden is on Respondent Court to justify its summary trial procedures and to show that the goals cannot be achieved by less draconian means. Again quoting from *Lammers*:

> "[W]hen an enactment broadly and directly impinges upon the fundamental constitutional rights of a substantial portion of those individuals to whom it applies, it can be upheld only if, considering its general and normal

[34] Id. at p. 348.
[35] Ibid.

application, its compelling justifications outweigh its impingement upon constitutional rights and cannot be accomplished by less intrusive means."[36]

Although Respondent Court will probably argue that its Rules comport with *Mathews v. Eldridge* and *Lammers'* requirements, Petitioner disagrees. There should be no dispute that the parties' *private interests* to custody of their children, a fair division of their property and adequate support are substantial. Contrary to Respondent Court's position, Petitioner believes that the risk of *erroneous deprivation* is substantial under the Court's summary procedures. His case is a good example. Because his declaration did not comport with the Court's nonstatutory rule regarding setting forth evidentiary foundation for all exhibits, he was deprived of his right to present a defense or to meaningfully cross-examine the witnesses against him. Likewise, contrary to the County's position that written testimony is superior to that received orally, Petitioner believes that judicial officers can better determine credibility by evaluating the witness before them than by declarations, especially when written for them by their attorneys.

Finally, the *governmental interest* needs to be examined. The question is should calendar efficiency be permitted to steamroll parties' rights to a trial on essential contested issues? We know where Respondent Court stands.

B. Trial by declaration is not as widespread a practice as Respondent Court suggests. Respondent Court states: "The federal courts in nonjury trials routinely allow

[36] *Lammers*, *supra*, 83 Cal.App.4th 1309, 1325.

the presentation of direct evidence by written testimony subject to oral cross and redirect evidence."[37] In fact, it makes this claim repeatedly throughout its Return.[38] However, the authorities that it cites do not support such a sweeping statement.

The Court's Return cites as its authorities for this statement primarily to bankruptcy cases and bankruptcy rules, including the local rules of the federal district courts in the District of Nevada, the Central District of California and the District of Massachusetts.[39] These rules, however, do not appear to support the Respondent Court's sweeping generalizations. The United States District Court, District of Nevada's Local Rules of Bankruptcy Practice do provide for an "alternate direct testimony procedure." However, the Rule[40] states:

> "(b) Stipulation for use. Upon stipulation of all parties involved and the approval of the judge, or upon order of the court, the alternate direct testimony procedure may be utilized in all trials of adversary proceedings or contested matters. The stipulation shall be filed with the court no later than the time of the pretrial conference required by LR 7016 and 7026."

The Central District of California U.S.D.C. Local Rule[41] for bankruptcy cases cited by Respondent Court is similar:

> **"**In any matter tried to the Court, the judge may order that the direct testimony of a witness be presented by written narrative statement subject to the witness' cross-examination at the trial. Such written, direct

[37] Court's Return, p. 20.
[38] Court's Return, pp. 2, 15, 20-22, 26.
[39] Court's Return, pp. 20-21.
[40] Part III: Local Rules of Bankruptcy Practice LR 9017 (b).

testimony shall be adopted by the witness orally in open court, unless such requirement is waived."

Both bankruptcy rules make *written* testimony permissive. Neither rule goes anywhere near as far as the Rule promulgated by Respondent Court, which makes *oral* testimony permissive. Neither bankruptcy rule comes close to supporting the sweeping generalizations made in the Return.

The Massachusetts District Court Rule, which is the only non-bankruptcy rule cited by Respondent Court in support of its position, is one with which Petitioner agrees. If Respondent Court adopted this Rule, which is much like the Local Rule adopted by the Marin County Superior Court,[42] Petitioner would agree that it is proper. U.S. Dist. Court Massachusetts, Local Rule 16.5 provides:

"(e) Conduct of Conference. The agenda of the final pretrial conference, when possible and appropriate, shall include: …

(10) a consideration of the feasibility of presenting direct testimony by written statement;

(11) the exploration of possible agreement among the parties on various issues and encouragement of a stipulation from the parties, when that will serve the ends of justice, including:

(a) that direct testimony of some or all witnesses will be taken in narrative or affidavit form, with right of cross-examination reserved; …

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[41] Central District of California U.S.D.C. Local Rules, L.R. 43-1 Non-Jury Trial - Narrative Statements.

[42] Marin County Superior Court Uniform Local Rules (2005), Rule 6.28B which permits parties stipulating to a similar procedure to have expedited trials. (http://www.co.marin.ca.us/depts/MC/main/PDFs-LocalRules/ULRules.pdf).

(12) a consideration of any other means to facilitate and expedite trial."[43]

This is the type of progressive local rule that should be encouraged. Much of the testimony in many family law trials is purely factual and relatively objective, e.g., what a tax return says, what a profit and loss statement says, the test scores and standing of a school district, etc. Encouraging this type of factual direct testimony to be introduced by declaration, subject to cross-examination and rebuttal, would streamline the case. Unfortunately, it is a far cry from the procedures adopted by Respondent Court which virtually eliminates direct and impeachment testimony in all specie of family law proceedings.

Federal courts have been nowhere near as anxious to abandon oral testimony in non-bankruptcy cases as suggested by Respondent Court. When they do so, it is under circumstances where the *Mathews v. Eldridge* test has clearly been met. In *Bellaire General Hosp. v. Blue Cross Blue Shield of Michigan*,[44] for example, relied upon by Respondent Court, the denial of the right to present oral testimony was affirmed because it was an ERISA "records case" and the district court was bound to the administrative record. Thus, the parties could not have supplemented that record with additional oral testimony even if the court wished to receive it.

[43] http://www.mad.uscourts.gov/LocPubs/localrules.htm
[44] *Bellaire General Hosp. v. Blue Cross Blue Shield of Michigan* (5th Cir. 1996) 97 F.3d 822, 827-828.

Likewise, in *Ball v. Interoceania Corp.*,[45] the issue was strictly one of statutory interpretation. In a motion for a new trial, defendant belatedly raised an objection to the form of the trial. The Court of Appeal stated: "Like the Ninth Circuit, we approve the procedure allowing the parties to produce direct evidence from their witnesses in writing while permitting subsequent oral cross-examination – particularly when the parties agree to that procedure in advance."[46] That is hardly a ringing endorsement for Respondent Court's position herein.

The Court puts its primary reliance on *In re Adair*,[47] a case that approved limiting direct testimony to declaration in bankruptcy cases. *Adair* involved a limited factual issue, namely whether the bank's failure to disburse the entire amount of their loan to the Adairs caused their failure to repay the loan. The only issue that the Court of Appeal discussed was whether the Adairs were denied due process by virtue of the requirement that all direct testimony during the nine days of proceedings be presented by written declaration, subject to cross-examination and redirect. The procedure was pursuant to the local rule which permitted the judge to require this. The Court of Appeal affirmed, noting that Ms. Adair could not complain because her affidavit, having been written by her lawyer, was cast in legalese rather than plain English and she could not explain it on the stand.

Petitioner does not dispute that *Adair* stands for the proposition that the federal bankruptcy rules permit cases to be decided on declarations subject to cross-examination.

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[45] *Ball v. Interoceania Corp.* (2nd Cir. 1995) 71 F.3d 73.
[46] Id. at p. 77.

However, that is a far cry from the leap that Respondent Court has made that the denial of the right to present direct testimony is permissible in all bench trials. Petitioner asks whether a bankruptcy proceeding is more like a denial of disability benefits or a family law case? Petitioner believes that most bankruptcy questions tend to be objectively factual, e.g., what is the value of this asset, when was it acquired, does it meet the criteria to be deemed exempt, etc. Witness credibility certainly plays a role, but nowhere near its role in family law proceedings.

Any judge who has sat in a family law department is intimately familiar with two spouses or parents looking the judge in the eye and swearing to diametrically opposite versions of the same event. The division of the parties' property, their financial future, and the welfare of their children ride on how the judicial officer weighs the proffered evidence. The *Adair* Court obviously believed that the additional safeguards provided by oral testimony did not outweigh the government's interest in efficiently processing the bankruptcy calendar. The question is whether our family law courts are going to be handled the same way.

Respondent's Return also cites and relies on *Marriage of Henches*, an unreported Washington State Court of Appeal opinion[48] that, much like California unpublished opinions, may not be cited as authority.[49] In fact, it appears that doing so in Washington

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[47] *In re Adair* (9th Cir. 1992) 965 F.2d 777.
[48] *In re Marriage of Henches* (Wash.Ct.App., Nov. 6, 2000, No, 41887-4-I) 2000 WL 1667394.
[49] RCWA 2.06.040.

would likely subject one to sanctions.[50] Examining the case anyway discloses that it involved a *temporary custody motion* wherein both parties submitted competing declarations and neither requested to testify orally nor objected to the procedure. The issue of direct testimony was raised for the first time on appeal.

Respondent Court also relies on another Washington "family law" case with which Petitioner agrees and urges this Court to consider. In *State ex rel. McGuire v. Howe*, the State commenced a paternity action on behalf of a child. The putative father appealed a finding of paternity arguing that his Due Process rights were violated because he wasn't permitted an evidentiary hearing before he was ordered to submit to a blood test to determine paternity. That hearing was not a "full" evidentiary hearing with oral testimony and cross-examination; rather, it involved submission of affidavits and argument of counsel. The Court of Appeal affirmed the procedure after engaging in the analysis mandated by *Mathews v. Eldridge*. The Court began by noting: "due process 'calls for such procedural protections as the particular situation demands' [and] there is no inherent right to offer oral evidence in support of a litigant's defense, [citation] nor is there an inherent right to confront or cross-examine witnesses in every type of proceeding."[51]

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[50] *Johnson v. Allstate Ins. Co.* (Wash.App. Div. 2, 2005) 126 Wash.App. 510, 519, 108 P.3d 1273, 1278 ["We agree that Allstate improperly relied on our unpublished opinion and that the trial court also erred in relying on it. *See Skamania County v. Woodall,* 104 Wash.App. 525, 536 n. 11, 16 P.3d 701, *review denied,* 144 Wash.2d 1021, 34 P.3d 1232 (2001), *cert. denied,* 535 U.S. 980, 122 S.Ct. 1459, 152 L.Ed.2d 399 (2002); RAP 10.4(h). And Allstate's self-serving comment that it did not submit the opinion as controlling authority under RCW 2.06.040 does not remove the taint from its inappropriate action. Because we affirm the trial court's ruling, the only remedy available to the Johnsons would be sanctions."]

[51] *State ex rel. McGuire v. Howe* (1986) 44 Wash.App. 559, 565, 723 P.2d 452, 455.

This is the portion of *McGuire* relied upon by Respondent Court herein but it ignores what follows in the opinion. The Washington Court of Appeal then engaged in the *Mathews v. Eldridge* analysis to determine whether this was the type of hearing where Due Process mandated the right to present oral testimony:

> "The type of hearing required depends on consideration of three factors: (1) the private interest that will be affected by the official action; (2) the governmental interest in the matter; and (3) the risk of erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards."[52]

The Washington Court then correctly performed that analysis.

The statutory prerequisite for such blood tests was simply whether "a *reasonable possibility exists"* that the requisite sexual contact occurred. The mother's affidavit asserted that it had. Thus, the question was what would be gained by a full evidentiary hearing given the extremely low standard of proof required? The Court weighed the *Mathews* factors:

(1) <u>The private interest affected by the official action</u>: This was the alleged father's right to privacy, which the Court agreed was fundamental, but not absolute. It could be reasonably regulated to safeguard society or where society otherwise has a compelling interest, such as in determining the paternity of children.

[52] Id. at 732 P.2d at p. 456.

(2) The governmental interest: "'[T]he State's interest in accurately determining the parentage of the children concerned is *compelling*.'"[53]

(3) The risk of an erroneous deprivation of the privacy interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards: Although the procedure from time to time resulted in an intrusion on the privacy rights of a falsely accused man, if the man was in fact falsely accused, the blood tests usually excluded him and resulted in his dismissal from the case. Furthermore, since, at the blood test stage of the paternity proceedings, the trial court was concerned only with the *probability* or *possibility* of the requisite sexual intercourse, there was little value in a procedure designed to determine the *fact* of sexual intercourse.

> "The question of whether sexual intercourse *in fact* occurred is adjudicated at trial, not at a pretrial hearing. Therefore, a weighing of the *Mathews* factors leads to the conclusion that the procedures used in this case were constitutionally sufficient, and the trial court did not err in denying the request for a full hearing."[54]

As Respondent Court herein asserts, the alleged father was denied his right to a full evidentiary hearing *at the pre-trial blood test stage*. However, the Washington Court only affirmed that decision after engaging in a full *Mathews* analysis. Since the privacy risk to the father was very small, the State's interest compelling, the risk of an erroneous deprivation of the protected interest through the procedure used low, and the probable

[53] Ibid.

value of additional procedural safeguards virtually nonexistent, the "trial by declaration" procedure was deemed to satisfy Constitutional Due Process.

Now, let's compare that to Respondent Court's Return. It does not engage in any specie of *Mathews* analysis. In fact, it doesn't even cite to *Mathews*, despite its being the seminal authority for the determination of when oral testimony can be excluded. When one does so, it becomes obvious why Respondent Court failed to rely on it.

(1) The private interest affected by the official action: One doubts that anyone would argue that the rights protected in a marital dissolution trial aren't compelling and constitutionally protected. Certainly the right to custody of one's children has been held to be constitutionally protected.[55] Likewise, the right not to be deprived of one's property without due process is certainly protected.[56] The right to receive or pay a fair amount of support is certainly substantial.[57]

(2) The governmental interest: The governmental interest identified by Respondent Court is simply that of calendar efficiency. Everyone agrees that this is a legitimate concern. The question is how it is achieved. Numerous opinions have discussed the need for local rules and procedures to balance the need for efficiency with the need to preserve both the fact and appearance of Due Process:

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[54] Ibid.
[55] *Troxel v. Granville* (2000) 530 U.S. 57, 69-70, 147 L.Ed.2d 49, 120 S.Ct. 2054; *In re Marriage of Harris* (2004) 34 Cal.4th 210, 17 Cal.Rptr.3d 842.
[56] U.S. Const., XIV Amend.; see also Cal. Const., Art. 1, §7.

> "We realize that the demands made on busy trial judges approach, if they do not already exceed, the unrealistic. … [¶] It is thus no surprise that, in their need for efficiency, trial judges have adopted procedures to streamline litigation. ... But, in adopting these new, efficient procedures, judges must remember another, equally important goal: preserving a process that not only is just, but also appears to be just. In spite of the need for efficiency, courts should not lose sight of the need that parties be given their 'day in court.' [¶] *The concept of parties being given their day in court has real as well as symbolic meanings*."[58]

Likewise, in *Lammers v. Superior Court:*

> "[C]ourt congestion and 'the press of business' will not justify depriving parties of fundamental rights and a full and fair opportunity to present all competent and material evidence relevant to the matter to be adjudicated."[59]

Although Family Law Courts are saddled with a heavy case load, there are many ways that they can reduce delays and still afford litigants both Due Process and the appearance of Due Process. Depriving them of the right to be heard in their own divorce should not be among them. Recall that under the operation of these Rules, Petitioner was not going to get to testify at all at his own trial.[60] This is a foreseeable by-product of these Rules and a tactic employed by good lawyers operating under them.

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[57] Fam. Code §4053.
[58] *Medix Ambulance Serv. v. Superior Court* (2002) 97 Cal.App.4th 109, 111-112, 118 Cal.Rptr.2d 249 (emphasis added).
[59] *Lammers v. Super. Ct. (Lammers)*, *supra*, 83 Cal.App.4th at pp. 1318-1319 (emphasis added, internal citations omitted).
[60] RT, p. 4/16-25.

(3) The risk of an erroneous deprivation of the protected interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards: This is where this Court has to weigh Respondent Court's arguments and determine whether the risks of erroneous deprivation through the summary procedures that it is enforcing are substantial and whether the probable value, both real and perceived, of an evidentiary trial in which the parties have a right to present their case orally to a judicial officer warrant additional "procedural safeguards."

The balancing analysis prescribed in *Mathews* is no stranger to published California family law opinions. It is the standard applied when determining whether family law court procedures comport with Due Process.[61]

The mere fact that these Rules are essentially applied to ALL family law cases in the Respondent Court shows that it is not engaging in the balancing process that *Mathews* requires. How can a "one-size-fits-all" TSO/Rule satisfy Due Process concerns in ALL cases? We know that the Respondent Court will say this is why it permits judges discretion to allow testimony in "unusual" cases. However, it has not provided a single example of a situation that would qualify as "unusual." We know that Petitioner's

[61] See, e.g., *Lammers v. Super. Ct. (Lammers), supra*, 83 Cal.App.4th at p. 1325, *Burt v. County of Orange* (2004) 120 Cal.App.4th 273, 283, 15 Cal.Rptr.3d 373; *Monterey County v. Cornejo* (1991) 53 Cal.3d 1271, 1286, 283 Cal.Rptr. 405; *Ohmer v. Super. Ct. (Ohmer)* (1983) 148 Cal.App.3d 661, 665, 196 Cal.Rptr. 224.

situation did not qualify – even though, to use the trial judge's own words, it resulted in his default.[62]

[62] RT, p. 17/10.

V.
RESPONDENT COURT'S RELIANCE ON *BROWN & YANA* IS MISPLACED

Surprisingly, and disturbingly, Respondent Court strongly relies on *Marriage of Brown & Yana*[63] for its position. Petitioner believes that the Court has totally misread the opinion and, in fact, that it supports Petitioner's argument. The issue in *Brown & Yana* was whether the non-custodial father was entitled to a full evidentiary hearing, including a full evaluation of the parties' 12 year-old child, simply because the custodial mother was moving to Las Vegas, where her husband had taken a job. Two years earlier, this Court said in *Marriage of LaMusga* that: "[T]he noncustodial parent bears the initial burden of showing that the proposed relocation of the children's residence would cause detriment to the children, requiring a reevaluation of the children's custody" and "[i]f the noncustodial parent makes such an initial showing of detriment, the court must perform the delicate and difficult task of determining whether a change in custody is in the best interests of the children."[64] In other words, once the noncustodial parent made a *prima facie* showing of detriment, s/he was *absolutely entitled to a full evidentiary hearing*. Absent such a showing, a hearing is not required. The requirement of a *prima facie* showing performs a gatekeeper function and strikes a balance between the custodial parent's presumptive right to move,[65] the presumption favoring stability in custodial arrangements[66] and the need to consider the best interests of the child and the possible

[63] *In re Marriage of Brown & Yana* (2006) 37 Cal.4th 947, 38 Cal.Rptr.3d 610.
[64] *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1078, 12 Cal.Rptr.3d 356.
[65] Fam. Code §7501.
[66] *In re Marriage of Brown & Yana, supra,* 37 Cal.4th at p. 956.

adverse effects of the move.[67] The idea is that if a noncustodial parent cannot make even a *prima facie* showing of detriment from the move, what is to be gained by a full evidentiary hearing?[68]

Brown & Yana approved the reasoning of and cited extensively from *Marriage of Dunn*[69] wherein the Court of Appeal considered the type of hearing required when a parent seeks modification of a post-dissolution child custody order. There, the trial court modified a preexisting custody order so as to effectively prohibit the father's new wife from participating in certain school, church, and scouting activities during the times when the mother had custody of the children. The matter was handled in two unreported informal chambers proceedings with only counsel present. In reversing the modification order, *Dunn* relied on Fam. Code sections 3170 and 3185 for the proposition that where mediation fails to resolve a custody dispute, "[t]he context of postjudgment modification orders appears to contemplate an oral hearing," where the party opposing a requested modification is "apprised of the date, time and place of the hearing, sufficiently in advance to appear or otherwise protect his or her interests." After noting the need for a party to introduce admissible evidence of changed circumstances at a formal hearing, *Dunn* indicated that an "evidentiary hearing" of contested factual issues should be

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[67] *In re Marriage of LaMusga, supra,* 32 Cal.4th at pp. 1097-1098.
[68] "Needless to say, an evidentiary hearing serves no legitimate purpose or function where the noncustodial parent is unable to make a prima facie showing of detriment in the first instance, or has failed to identify a material but contested factual issue that should be resolved through the taking of oral testimony." (*In re Marriage of Brown & Yana, supra,* 37 Cal.4th at p. 962.)
[69] *In re Marriage of Dunn* (2002) 103 Cal.App.4th 345, 126 Cal.Rptr.2d 636.

conducted "if necessary."[70] In reaching its conclusions, *Dunn* emphasized that "'[i]n spite of the need for efficiency, courts should not lose sight of the need that parties be given their "day in court."'"[71]

In other words, both *Brown & Yana* and *Dunn*, without saying so, engaged in a balancing test much like that mandated in *Mathews*. In *Brown & Yana*, an evidentiary hearing was not required unless an objecting non-custodial parent could make a *prima facie* showing of detriment; conversely, once such a showing was made, a full evidentiary hearing was required. In *Dunn*, an evidentiary hearing was required—period. This is a far cry from the Respondent Court's interpretation of *Brown & Yana.*

[70] Id. at p. 348.
[71] *In re Marriage of Dunn*, at p. 348, discussed in *In re Marriage of Brown & Yana* at p. 962.

VI.
DUE PROCESS IS A FLEXIBLE CONCEPT AND DOES NOT REQUIRE THAT ORAL TESTIMONY BE RECEIVED IN EVERY SITUATION

Petitioner is not suggesting that Due Process always demands the right to present oral testimony. He understands that it is "flexible and calls for such procedural protections as the particular situation demands."[72]

> "'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'" [73]

Thus, for example, *Reifler* declarations are proper in many situations.[74] Many other types of proceedings can be properly heard only on declaration, for example, law and motion matters,[75] withholding of Medi-Cal payments pending fraud investigation,[76] third-party claim procedures in judicial foreclosure and sale,[77] and denial of application of concealed weapons permit.[78]

Other situations, on the other hand demand a full hearing. Examples include contempt citations,[79] sanctions,[80] placing an employee on involuntary illness leave of

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[72] *Mathews v. Eldridge*, *supra,* 424 U.S. at p. 321.
[73] *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 654, 183 Cal.Rptr. 508.
[74] See, e.g., *In re Marriage of DeRoque* (1999) 74 Cal.App.4th 1090, 88 Cal.Rptr.2d 618 [motion to strike]; *Linhart v. Nelson* (1976) 18 Cal.3d 641, 134 Cal.Rptr. 813, 557 P.2d 104 [motion for new trial]; *Reifler v. Super. Ct. (Reifler)* (1974) 39 Cal.App.3d 479, 484, 114 Cal.Rptr. 356 [post-judgment motions]; *In re Marriage of Biderman* (1992) 5 Cal.App.4th 409, 6 Cal.Rptr.2d 791 [routine motions and orders to show cause].
[75] Cal. Rules of Court, rule 323 [Code of Civil Procedure section 2009 extends to "special proceedings" which are "distinct from, and not a mere part of, any underlying litigation."] *Avelar v. Superior Court* (1992) 7 Cal.App.4th 1270, 1275, 9 Cal.Rptr.2d 536].
[76] *Bergeron v. Department of Health Services* (1999) 71 Cal.App.4th 17, 83 Cal.Rptr.2d 481.
[77] *Whitehouse v. Six Corp.* (1995) 40 Cal.App.4th 527, 537, 48 Cal.Rptr.2d 600, 606.
[78] *Sommerfield v. Helmick* (1997) 57 Cal.App.4th 315, 320-321, 67 Cal.Rptr.2d 51,54-55.
[79] *Reifler v. Super. Ct. (Reifler), supra,* 39 Cal.App.3d at p. 484.
[80] *In re Marriage of Flaherty, supra,* 31 Cal.3d at p.654.

absence ,[81] termination of general assistance benefits for fixed duration for recipients who failed to comply with various aspects of county's work-for-relief program,[82] and harassment injunction requests.[83]

However, in *all* of the above cases, the courts engaged in a weighing process of the type required by *Mathews.*

[81] *Bostean v. Los Angeles Unified School Dist*. (1998) 63 Cal.App.4th 95, 117-118, 73 Cal.Rptr.2d 523, 536-537.
[82] *Jennings v. Jones* (1985) 165 Cal.App.3d 1083, 212 Cal.Rptr. 134.
[83] *Nora v. Kaddo* (2004) 116 Cal.App.4th 1026, 10 Cal.Rptr.3d 862.

VII.
RESPONDENT COURT'S POSITION THAT CREDIBILITY CAN BE AS ACCURATELY WEIGHED IN AN AFFIDAVIT AS THROUGH IN-PERSON TESTIMONY FLIES IN THE FACE OF ALL LEGAL PRECEDENT

One of Respondent Court's key suggestions is that a judicial officer can as accurately weigh the credibility of a witness based upon a declaration (which, if the person is represented by counsel, is certainly written or at least vetted by that counsel) as it can by watching the witness testify in person. This is a radical position that flies in the face of centuries of judicial experience and for which Respondent Court cites a single published law review article too recent to have been tested or even replied to and a single unpublished article.

Discussing *Goldberg v. Kelly*,[84] the Supreme Court in *Mathews* stated:

> "[W]ritten submissions were [held to be] an inadequate substitute for oral presentation because they did not provide an effective means for the recipient to communicate his case to the decision maker. Written submissions were viewed as an unrealistic option, for most recipients lacked the 'educational attainment necessary to write effectively' and could not afford professional assistance. In addition, such submissions would not provide the 'flexibility of oral presentations' or 'permit the recipient to mold his argument to the issues the decision maker appears to regard as important.'"[85]

It is also clear that trial by declaration cannot be approved in all situations. The Supreme Court has disallowed written submissions for termination of welfare benefits:

[84] *Goldberg v. Kelly, supra,* 397 U.S. 254.

> [W]ritten submissions do not afford the flexibility of oral presentations; they do not permit the ... [litigant] to mold his argument to the issues the decision maker appears to regard as important. *Particularly where credibility and veracity are at issue*, as they must be in many ... proceedings *... written submissions are a wholly unsatisfactory basis for a decision.*[86]

Likewise, in *Broadcast Music v. Havana Madrid Restaurant Corp.*,[87] the federal Court of Appeals stated:

> "[T]he demeanor of an orally-testifying witness is 'always assumed to be evidence.' It is 'wordless language.' The liar's story may seem uncontradicted to one who merely reads it, yet it may be 'contradicted' in the trial court by his manner, his intonations, his grimaces, his features, and the like—all matters which 'cold print does not preserve' and which constitute 'lost evidence' so far as an upper court is concerned. For such a court, it has been said, even if it were called a 'rehearing court,' is not a 'reseeing court.' Only were we to have 'talking movies' of trials could it be otherwise. A 'stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried.' It resembles a pressed flower. The witness' demeanor, not apparent in the record, may alone have 'impeached' him. The alleged 'rule,' if taken literally, would return us to the practice of 'trial by deposition,' which common-law procedure rejected and which, in recent years, has been rejected in federal noncommon law trials as well."

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[85] *Mathews v. Eldridge, supra,* 424 U.S. at p. 345.
[86] *Goldberg v. Kelly, supra,* 397 U.S. at p. 269 (emphasis added).

This concept that witness demeanor is part of the evidence that a trier of fact must weigh is deeply engrained in California law as well:

- *Estate of MacDonald*:[88] "The trial court here was in the best position to judge decedent's purpose, construed in light of the documents, the evidence, and the testimony and demeanor of the witnesses."
- *Marquette v. State Bar*:[89] "When the findings rest primarily on testimonial evidence, '"we are reluctant to reverse the decision of the [hearing panel], which was in a better position to evaluate conflicting statements after observing the demeanor of the witnesses and the character of their testimony."'"
- *Catherine D. v. Dennis B.*:[90] "'The trial judge, having heard the evidence, observed the witnesses, their demeanor, attitude, candor or lack of candor, is best qualified to pass upon and determine the factual issues presented by their testimony. This is especially true where the custody of minor children is involved.'"
- *In re Johnson*:[91] "Deference to the referee is called for on factual questions, especially those requiring resolution of testimonial conflicts and assessment of witnesses' credibility, as the referee has the opportunity to observe the witnesses' demeanor and manner of testifying."

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[87] *Broadcast Music v. Havana Madrid Restaurant Corp*. (2nd Cir. 1949) 175 F.2d 77, 80.
[88] *Estate of MacDonald* (1990) 51 Cal.3d 262, 281, 272 Cal.Rptr. 153.
[89] *Himmel v. State Bar* (1971) 4 Cal.3d 786, 794, 94 Cal.Rptr. 825, quoting *Marquette v. State Bar* (1988) 44 Cal.3d 253, 242 Cal.Rptr. 886.
[90] *Catherine D. v. Dennis B.* (1990) 220 Cal.App.3d 922, 269 Cal.Rptr. 547.
[91] *In re Johnson* (1998) 18 Cal.4th 447, 461, 75 Cal.Rptr.2d 878, 886.

- *In re Malone*:[92] "[T]he referee is called for on factual questions, especially those requiring resolution of testimonial conflicts and assessment of witnesses' credibility, because the referee has the opportunity to observe the witnesses' demeanor and manner of testifying."
- *Blank v. Coffin*:[93] "If the credibility of the evidence in opposition to the inference is beyond any question when such evidence is subjected to any of the tests of credibility, then it might be said to be conclusive on the trier of fact. It is at once apparent that that limitation does not apply to oral testimony for the reason that one of the tests of credibility is the demeanor of the witness and his manner of testifying [citation], the observation of that factor may be made only by the trier of fact. It necessarily cannot be determined by an appellate court."
- *Robinson v. Robinson*:[94] "The trial court was the exclusive judge of all questions of credibility of witnesses and weight of evidence."
- *Van Camp v. Van Camp*:[95] "The demeanor, appearance, and mental make-up of the complainant were all factors which would be proper to be considered, none of which can find much expression in the narrative of the testimony as it appears in cold type."

[92] *In re Malone* (1996) 12 Cal.4th 935, 946, 50 Cal.Rptr.2d 281, 288.
[93] *Blank v. Coffin* (1942) 20 Cal.2d 457, 466, 126 P.2d 868, 873.
[94] *Robinson v. Robinson* (1911) 159 Cal. 203, 204, 113 P. 155, 156.
[95] *Van Camp v. Van Camp* (1921) 53 Cal.App. 17, 24, 199 P. 885.

- *Marriage of Sheridan*:[96] "Whether there has been such unreasonable delay is a question addressed peculiarly to the trial court which heard the party's testimony and observed the party's demeanor at trial."

One of the best discussions of the importance of demeanor evidence is found in *Meiner v. Ford Motor Co*.[97] The California Court of Appeal began with the quote set forth above from *Broadcast Music v. Havana Madrid Restaurant Corp*. It then continued:

> "'The cold record cannot give the look or manner of the witnesses; their hesitations, their doubts, their variations of language, their precipitancy, their calmness or consideration. A witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony when read, may convey a most favorable impression.' [Citation.] 'There are many factors aiding in a reasonable conclusion which are presented to the trier of facts in the first instance and not available to one going over the cold record. There is what might be called the "feel" of the case. This embraces a consideration of the witnesses, the manner in which they testify and their general attitude in the court room.' [Citation.]" one witness may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify. * * *' [Citation.] ' [Citation.]
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> On the cold record a witness may be clear, concise, direct, unimpeached, uncontradicted—but on a face to face evaluation, so exude insincerity as to render his credibility factor nil. Another witness may

[96] *In re Marriage of Sheridan* (1983) 140 Cal.App.3d 742, 749, 189 Cal.Rptr. 622
[97] *Meiner v. Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140-142, 94 Cal.Rptr. 702, 710-712.

fumble, bumble, be unsure, uncertain, contradict himself, and on the basis of a written transcript be hardly worthy of belief. But one who sees, hears and observes him may be convinced of his honesty, his integrity, his reliability. All of this is because a great deal of that highly delicate process we call evaluating the credibility of a witness is based on what might be called, for lack of a better word, 'intuition'—that intangible, inarticulable capacity of one human being to evaluate the sincerity, honesty and integrity of another human being with whom he comes in contact. There is no way of knowing or proving how much of the testing process is encompassed in the 'traditional' tests of credibility such as provable bias or interest, contradiction or impeachment, all demonstrable on the record, and how much of that evaluation process comes from the purely subjective reaction of the trier of facts to the attitude, demeanor and manner of testifying of the witness--not demonstrable on the record. Evidence Code, §780, recognizes this wherein it provides, in pertinent part:

'* * * the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

'(a) His demeanor while testifying and the manner in which he testifies.'

None of this demeanor or manner of testifying appears on the record and, therefore, the matter of the credibility of witnesses is not susceptible to that precise or exact appellate review which are matters susceptible to objectively assessable criteria…. [¶] … When a trial judge gives as his reason that he disbelieves a certain witness because of that witness' demeanor and manner of testifying, he need and should not say more."[98]

[98] *Ibid.*

In a contested hearing, the precise words and demeanor of a witness during direct as well as cross-examination bears on the credibility and weight the trier of fact accords the witness's testimony. Moreover, observation of a witness on direct is important to the planning and execution of effective cross-examination."[99]

In *Lammers*, as here, Petitioner's private interest in having a meaningful hearing "and all that that right encompasses outweighs any state interest in conserving and allocating finite judicial resources in an efficient and expedient manner."[100]

Petitioner simply does not agree that the time has come to scrap the centuries old rule that demeanor is evidence to be weighed by the trial court.

[99] *Denny H. v. Super. Ct. (SFDHS*) (2005) 131 Cal.App.4th 1501, 1513-1514, 33 Cal.Rptr.3d 89.
[100] *Lammers, supra,* 83 Cal.App.4th at p. 1329.

VIII.
THE RULES VIOLATE CALIFORNIA STATUTORY LAW

Respondent Court argues that its Rules are statutorily authorized by Evidence Code section 765, which gives that court "reasonable control over the mode of interrogation of a witness…"[101] Petitioner believes that Respondent Court reads this statute too broadly. Moreover, the Court's Return begins by arguing that its procedures are expressly authorized by this statute[102] but later steps backwards to "implicitly authorized by the goal" of this and the similar federal statutes.[103] There is a big gap between those two positions.

Petitioner believes that to the extent statutory authority is relevant to the resolution of this case, the more specific statutes should control. Evidence Code section 772(a) provides that the examination phases of a witness are "direct examination, cross-examination, redirect examination, recross-examination, and continuing thereafter by redirect and recross-examination." Pursuant to Local Rule 12.5(b)(3) (and proposed Local Rule 12.8.F.1.a), no oral direct examination of a witness is permitted. Local Rule 12.6(e)(1) (and proposed Local Rule 12.8.F.3.b)), prohibit establishing the foundation and admissibility of a court-appointed expert's report, which would otherwise be objectionable as hearsay,[104] prior to it being received into evidence.

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[101] Court's Return, pp. 14-16.
[102] Ibid.
[103] Court's Return, pp. 30-31.
[104] *In re Marriage of Smith* (1978) 79 Cal.App.3d 725, 753, 145 Cal.Rptr. 205.

The Legislature has provided that law and motion matters shall be decided by declaration.[105] One would think that if the Legislature intended this procedure to be applied in trials, it would have specifically authorized this. It has not.

Respondent Court's Rules not only violate all accepted notions of what constitutes a "trial" they totally negate one of the key reasons that courts of appeal defer to trial courts on findings of fact, namely they are the ones who "look the witness in the eye" and judge their credibility. Evidence Code section 780 (paraphrased below) provides that judging credibility is one of the functions of the trier of fact:

> Except as otherwise provided by statute,[106] the court ... may consider [the following] in determining the credibility of a witness...:
>
> (a) His demeanor while testifying ...
>
> (b) The character of his testimony….
>
> (e) His character for honesty or veracity or their opposites.
>
> (f) The existence or nonexistence of a bias, interest, or other motive.
>
> (g) A statement ... that is consistent [or inconsistent] with his testimony at the hearing….
>
> (j) His attitude toward the action in which he testifies or toward the giving of testimony….

How was the trial court to weigh Petitioner's credibility if he was to be precluded from testifying?

Instead, the Local Rule elevates form over truth and places a premium on the skill of the attorney in drafting the declaration, rather than the credibility of the witness in

[105] Code Civ. Proc. §2009, see also Cal. Rules of Court, rule 323.

testifying as to the facts. How does one weigh credibility from a declaration, especially one written by a party's attorney?

Without live testimony, the ability to observe the witness's body language, emotion (or lack thereof), expression and affect – a large part of the overall message – is lost. Where direct examination is precluded, the court is deprived of the ability to contrast the behavioral clues to credibility where the testimony is offered by narrative, spontaneously, and is unconfined in parameter. In contrast, on cross-examination, the witness is limited to the narrowly focused questions crafted to secure the most favorable response to the examiner and to put the witness in the worst possible light.

Moreover, as happened to Petitioner herein, [107] through the tactic of not cross-examining the opposing party, a skillful attorney can prevent him or her from getting to say a word at his or her own trial.

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[106] According to the plain language of the statute, local rules may not vary the provisions of this section

[107] RT, p. 4/16-25.

IX.
THE COURT'S PROCEDURES/RULES/PRACTICES REGARDING THE INTRODUCTION OF EVIDENCE ALSO VIOLATES DUE PROCESS

This case involves more than simply a challenge to the "trial by declaration" portion of the TSO/Local Rules. It also challenges the Court's requirement that as a condition for admission, the party must "completely set forth .. [the] evidentiary foundation for admission of the proposed exhibits …"[108] in their declarations. The Rule continues: "rulings [as to admissibility of the proffered exhibits] will be based on the declarations alone."[109] This is enormously burdensome and unpredictable. Many exhibits, such as communications from the other party, transcripts, etc. will normally come into evidence with no foundation other than identifying it for the record. If an objection is raised at trial, the Court hears argument and perhaps lets the proffering party lay additional foundation. All of that is expressly precluded by the Rules. You get one shot. That is burdensome on attorneys. Imagine the havoc it raises on *pro pers*.

Respondent Court has not cited to any case or statute approving such an onerous requirement for the admission of evidence. It has not explained how a *pro per* litigant is expected to comply with it. Instead it attempts to duck the issue by arguing that somehow Petitioner lacks standing to assert it because the trial judge offered him the opportunity to "rethink your arguments and give me the specific evidentiary foundations for these documents."[110] Respondent Court argues that this meant that it had "relieved Jeffrey of the requirements of the TSO" by giving him an opportunity to come back in and show the

[108] Trial Scheduling Order, ¶ 2, filed April 22, 2005, AA, Tab 2 and Proposed Rule 12.8.F.5.
[109] Proposed Rule 12.8.F.5.

"evidentiary foundation for his exhibits," hence he was not aggrieved.[111] This suggests that the trial judge was going to permit Petitioner to put on oral testimony to lay the requisite foundation. However, the person affirming the Court's Return was **not** the trial judge, who is also the Supervising Judge of the Family Law Department, but the Presiding Judge of the Court who has no personal knowledge of what occurred.

Frankly, it is unclear what the trial judge was giving Petitioner the opportunity to do. It clearly was not to provide additional evidentiary foundation, since the judge had just stated that it would not permit him to offer direct testimony to do so.[112] Moreover, Petitioner had just made a *prima facie* showing of admissibility of the accounting that was Exhibit 5, *yet it was excluded anyway*.[113] Moreover, many of the exhibits really didn't need an evidentiary foundation as they consisted of communications from his wife and her deposition transcript, yet they were excluded as well. What the Court was doing was giving Petitioner an opportunity to *rethink his argument* and show where the foundations were *in his declaration*, not to lay an evidentiary foundation through testimony, as it had already ruled that he could not do so.

Moreover, Respondent Court ignores the following discussion:

> "MR. ELKINS: … My concern is that I came into the trial with the intent of presenting my position, and I'm being cut out of that completely with only reliance on two exhibits which are – no way can defend my position.

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[110] Court's Return, p. 12, also pp. 11-12, 19, 34.
[111] Court's Return, p. 12.
[112] RT, pp. 8-9.
[113] Ibid.

> So I might as well give up my position and leave it to the best well-being of my family."
> THE COURT: Well, that may be the correct advice….
> MR. ELKINS: Your Honor, if you take a spreadsheet and add up and deduct everything that Mr. Harkins is asking for, I am left with nothing. Zero dollars. Zero house. Zero car. Nothing. So what's the difference?
> THE COURT: All right. Well, I'm going to take the case under submission, and I will rule on the matter…."[114]

An objective reader cannot read this and believe that the trial court had "relieved Jeffrey of the requirements of the TSO." The trial judge agreed that since Petitioner could not defend his position without his exhibits, throwing in the towel might be "the correct advice." Had the trial judge said, "But I relieved you of the requirements of the TSO," the Court's position would be well taken. That is not what Petitioner was told. He was told, "Well, that may be the correct advice…." The trial judge had no intention of relieving Petitioner of the requirements of the TSO. An objective reader cannot conclude that Petitioner was acquiescing in the trial court's decision or that he was not aggrieved by it.

Respondent Court's failure to proffer any legal defense for this procedure or its application in this case speaks volumes.

The application of the Rules effectively denied Petitioner his day in court. They should not be permitted to stand.

[114] RT, pp. 19/26-20/27 (emphasis added).

X.
THE COURT HAS NOT CONSIDERED THE EFFECT THAT ITS RULE WILL HAVE ON THE PUBLIC'S CONFIDENCE IN THE COURTS

The Court's Return acknowledges that: "'[A] procedure that relies on a lawyer's submission of written or substitute materials could well be taken not to be a "day in court" by litigants.'"[115] Petitioner agrees with this statement. Ironically, at the very time that review was granted in this case, an article appeared in *California Courts Review* entitled: "What Do They Expect? New Findings Confirm the Precepts of Procedural Fairness."[116] The article asked the question: "What leads people to feel confidence in the courts and to be satisfied with the way the courts handle the problems that come before them?"[117] It found that the answers were clear.

> "Research conducted in California and throughout the United States provides a clear and consistent answer to this question. People react, more than anything else, to whether or not they believe the courts are using *just procedures* in dealing with the conflicts…. [¶] Irrespective of why they are in court, people's reactions are most strongly shaped by whether they think they have received a fair 'day in court,' in the sense that their concerns have been addressed through a just process…."[118]

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[115] Court's Return, p. 30.
[116] Tom R. Tyler, Ph.D., California Courts Review, Winter 2006, pp. 22-24. (A copy is included in Petitioner's Appendix as Tab A.) See also "Addressing Public Trust and Confidence: Court and Community Collaboration, The Judicial Council of California Administrative Office of the Courts, Report of January 26, 1999, which begins: "'Public Shows Little Confidence in Courts'." (http://www.courtinfo.ca.gov/programs/community/outreach/documents/reprt.doc)
[117] Id. at p. 22.
[118] Ibid.

What was the number one thing that studies have shown gives people confidence in their courts? "**Voice:** People want to have an opportunity to state their case to legal authorities. They are interested in having a forum in which they can tell their story."[119]

The article continued by noting that the next important component in people's confidence in their courts was: "**Trust in Authorities:** People focus on clues about the intentions and character of the legal authorities with whom they are dealing. People react favorably to the judgment that the authorities are benevolent and caring and are sincerely trying to do what is best for individuals. *Authorities communicate this type of concern when they listen to people's accounts and explain or justify their actions in ways that show an awareness of and concern about people's needs and issues.*…"[120]

The article continued by noting that "Trust … is a key issue in personal experiences with judges and other court personnel … [and that] … procedural judgments are more central to people's willingness to accept the outcomes of court cases than are outcome judgments…."[121] This perception was especially important to the losing party:

> "What is striking about procedural justice judgments is that they shape the reactions of those who are on the losing side. If a party who receives an unfavorable outcome feels that the outcome was arrived at in a fair way, he or she is more likely to accept it…. People who believe they have experienced procedural justice in court rate the court system and court personnel more favorably than people who don't have that belief….The findings of the recent California study of the courts are typical of studies of trust and confidence in the courts, including a national survey of public

[119] Ibid.
[120] Id. at p. 23 (emphasis added).

> trust and confidence in state courts, reported on in 2001.[122] The national study also showed that the public's evaluations of state courts are based on evaluations of the fairness of court procedures…."[123]

The article noted that these findings have implications for the administration of the courts:

> "In particular, they suggest the value of building public trust and confidence by designing court procedures so that court users have positive experiences. Based on the 2005 California survey, efforts in this state should be concentrated on traffic, family, and juvenile courts, where dissatisfaction is currently high…."[124]

Dr. Tyler concluded with this prophetic statement: "Whatever you do, remember …: people want an opportunity to tell their stories to an authority who listens…."[125]

The procedures utilized in Contra Costa County Superior Court are the antithesis of that which Dr. Tyler reported engender confidence in the courts. By virtue of the procedures utilized, Petitioner was denied his right to say a word about his case to the judicial officer that was going to be deciding it. As was stated during Petitioner's "trial":

> "[S]ince Mr. Elkins did not submit a second declaration if I don't cross-examine him, which I would not do based on the declaration, he's not entitled to offer any further evidence."[126]

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[121] Ibid.
[122] Citing to T.R. Tyler, "Public Trust and Confidence in Legal Authorities: What do Majority and Minority Group Members Want From the Law and Legal Institutions?" (2001) *19 Behavioral Sciences and the Law* 215-235.
[123] Tyler, supra, at p. 23.
[124] Id. at p. 24.
[125] Ibid.

In other words, Petitioner was not going to get to say a word in his own trial. Moreover, since he was denied the use of his documentary evidence, he was effectively prevented from cross-examining either of the witnesses against him. This cannot be Due Process.

The Rules state: "The Court may decide contested issues on the basis of the pleadings submitted by the parties without live testimony."[127] The Court assures that it would never implement this except in situations where the parties "choose not to exercise the right of cross-examination."[128] It forgets that it is also implemented where due to the application of the Rules, parties are precluded from testifying.

No matter how much Respondent Court argues, it will never convince those appearing before it that they have had a "trial" when they are not permitted to tell their stories to the judicial officer who will decide their fates and that of their children. This is simply not a "trial" as the public has come to expect one. This approach simply cannot comport with Due Process and cannot engender respect for the courts.

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[126] RT, p. 4/16-25.
[127] Current Rule 12.5(b)(3).
[128] Court Return, pp. 8-9.

XI.
THE RULES WERE UNCONSTITUTIONAL AS APPLIED

Even if the "trial by declaration" rules are deemed to be substantively permissible, they can still violate procedural Due Process as applied to an individual, as they were to Petitioner herein.

> "Although an enactment is held to be facially constitutional, it may have nevertheless been unconstitutionally applied as to a specific individual under particular circumstances, depriving that person of a protected right, such as a meaningful opportunity to be heard."[129]

This issue is squarely raised and briefed in the Petition for Review,[130] yet the Court's Return doesn't speak to it. It appears that it has made a tactical decision to accept such a finding in hopes of preserving the Rules themselves.

"A contention raised in opening brief to which respondent makes no reply in its brief 'will be deemed submitted on appellant's brief'"[131]

XII.
CONCLUSION

Petitioner hopes that this Court does not take his criticisms of Respondent Court's attempts to streamline its procedures as a lack of respect for its motives. He understands that "[D]ue process is flexible and calls for such procedural protections as the particular

[129] *Id.*, p. 1328.
[130] Petition for Review, section II.
[131] Eisenberg, *supra*, ¶9.68.

situation demands."[132] However, he believes that the Court has gone too far in its quest to reduce its calendar and has sacrificed justice for expediency. Petitioner asks that this Court grant the following relief:

- Reverse the judgment in his case and remand it for a full evidentiary hearing;
- Declare the Trial Setting Order procedure utilized by Respondent Court as a violation of California statutory law and a denial of Due Process;
- Declare current Contra Costa County Superior Court Local Rules, Rule 12.5(b) to be unconstitutional as a denial of Due Process;
- Declare proposed Contra Costa County Superior Court Local Rules 12.8.F.1--6 and 12 to be unconstitutional as a denial of Due Process;
- Declare that the application of the Rules to Petitioner was unconstitutional as applied; and
- Award Petitioner whatever other relief this Court deems just and proper.

Dated: May 15, 2006

Respectfully submitted,

Garrett C. Dailey
Attorney for Petitioner
Jeffrey Elkins

[132] *Mathews v. Eldridge, supra*, 424 U.S. at p. 321.

CERTIFICATE OF COMPLIANCE

I, Garrett C. Dailey, attorney for Petitioner Jeffrey Elkins, hereby certify that, pursuant to Cal. Rules of Court, rule 14(c)(1), this brief contains approximately 13,007 words, including footnotes, as computed by the Microsoft Word 2003 word counter.

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Garrett C. Dailey